

**BASICS FOR PB AND ZBA MEMBERS**

**NH OEP Annual Planning & Zoning Conference**

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**CONFLICT OF INTEREST**

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#### 673:14 Disqualification of Member.

I. No member of a zoning board of adjustment, building code board of appeals, planning board, heritage commission, or historic district commission shall participate in deciding or shall sit upon the hearing of any question which the board is to decide in a judicial capacity if that member has a direct personal or pecuniary interest in the outcome which differs from the interest of other citizens, or if that member would be disqualified for any cause to act as a juror upon the trial of the same matter in any action at law. Reasons for disqualification do not include exemption from service as a juror or knowledge of the facts involved gained in the performance of the member's official duties.

II. When uncertainty arises as to the application of paragraph I to a board member in particular circumstances, the board shall, upon the request of that member or another member of the board, vote on the question of whether that member should be disqualified. Any such request and vote shall be made prior to or at the commencement of any required public hearing. Such a vote shall be advisory and non-binding, and may not be requested by persons other than board members, except as provided by local ordinance or by a procedural rule adopted under RSA 676:1.

III. If a member is disqualified or unable to act in any particular case pending before the board, the chairman shall designate an alternate to act in his place, as provided in RSA 673:11.

#### 500-A:12 Examination.

I. Any juror may be required by the court, on motion of a party in the case to be tried, to answer upon oath if he:

- (a) Expects to gain or lose upon the disposition of the case;
- (b) Is related to either party;
- (c) Has advised or assisted either party;
- (d) Has directly or indirectly given his opinion or has formed an opinion;
- (e) Is prejudiced to any degree regarding the case; or
- (f) Employs any of the counsel appearing in the case in any action then pending in the court.

## **CONFLICT-OF-INTEREST**

### **1. RSA 673:14 is the controlling law in New Hampshire.**

- It applies to all municipal land use boards.
- When board acting in "judicial" or "quasi-judicial" capacity.
  - These are applications where a persons rights are being determined, such as the right to develop or build upon one's land.
  - Board is weighing and considering evidence and arguments.
  - Does not include decisions such as planning board deliberations on zoning amendments, master plans, CIP's, subdivision regulations, etc.
- There are two standards of review:
  - 1) Direct personal or pecuniary interest different from other citizens.
  - 2) The "juror" standard. See RSA 500-A:12.
- Does not apply to "facts gained in performance of official duties."
  - What about personal knowledge and experience? OK in most cases.
  - Avoid "ex parte" discussions, conferences, phone calls. This is a good rule for those representing applicants or abutters, as well.

### **2. Conflicts in legislative or administrative capacity.**

- The standard is less strict.
- Direct personal or pecuniary interest is still the test.
- Expressing an opinion on a legislative matter before its voted on is usually OK. In other words there is no such thing as "legislative prejudgment." The planning board's consideration of a zoning amendment would be an example of this.

### **3. What is clearly out?**

- An abutter.
- A directly affected neighbor who is not an abutter.
- Relative of applicant-- but how close? What about an abutter's relative?

### 3. What is clearly out? (continued)

- Financial interest in proposal.
- Significant business relationships with an applicant.
- Pre-formed decisions.
- Employment relationships.
- Currently using same lawyer or engineer.
- A planning board member on a ZBA administrative appeal from a PB decision.

### 4. Prejudgment.

- This is a very difficult area.
- There is a difference between preconceived points of view on issues, policies and principles of law and the prejudgment of facts about specific cases.
- Some Examples.
  - ZBA member attends planning board hearing and speaks in favor of a "big box" site plan applicant in an application proceeding that has generated substantial community opposition. Same person speaks favorably of applicant around town and wears a T-shirt around town with applicants "logo." What happens when the same application comes before ZBA for a variance?
  - In a controversial application proceeding involving a large development on an environmentally sensitive site, a community group has developed lawn signs advocating disapproval of the project. Midway through a multi-month local proceeding, such a sign pops up on a land use board member's lawn. Is the land use board member disqualified? What if the member's spouse put the sign up?
  - At the beginning of a site plan review application process, the chairman of the planning board gives a newspaper interview and is quoted as saying the application met all zoning requirements. At the next meeting of the planning board, abutters challenge the project on the grounds that it is not permitted by the zoning ordinance. They ask the chairman to recuse himself. Should he?
  - In an application proceeding that has taken several meetings, a board member comes to the last meeting with a draft Motion to Deny all typed up with copies for other board members?
- The Rule: If you are a board member, be very careful about what you say about the specific application which is before you or about to be before you.

## 5. What is fuzzy?

- ♦ Prior legal or engineering representations. Their lawyer was your lawyer.
- ♦ Prior relationships in general.
- ♦ Imputed conflicts. You work for a business that may have a conflict.
- ♦ The juror test. RSA 500-A:12 states:

### **500-A:12 Examination.**

I. Any juror may be required by the court, on motion of a party in the case to be tried, to answer upon oath if he:

- (a) Expects to gain or lose upon the disposition of the case;
- (b) Is related to either party;
- (c) Has advised or assisted either party;
- (d) Has directly or indirectly given his opinion or has formed an opinion;
- (e) Is employed by or employs any party in the case;
- (f) Is prejudiced to any degree regarding the case; or
- (g) Employs any of the counsel appearing in the case in any action then pending in the court.

II. If it appears that any juror is not indifferent, he shall be set aside on that trial.

Some of the decisions may surprise you. For example:

- A foreman of company who had sanded defendant's driveway in a slip and fall negligence lawsuit?
- A relative of an employee of the defendant corporation?
- A former client of the defendant's attorney?
- In a criminal trial, the niece of the next door neighbor to the crime scene where an elderly couple had been robbed and then tied up?
- In a ZBA variance proceeding for a county hospital where a member of the ZBA works for the county food program?
- What about the lawyer (or surveyor or engineer) who is also a public official?

## **6. Miscellaneous Notes.**

- The ultimate inquiry in any conflict scenario is whether the juror (or land use board member) is "indifferent."
- Ramifications of a conflict. The decision is voided, no matter what the vote was. *Winslow v. Holderness*, 125 N.H. 262 (1984).

This is for judicial or quasi-judicial decisions only. For a legislative decision, the decision is nullified only if the conflict determined the outcome. (i.e. a one vote margin, for example)

- Philosophical conflicts.
  - Developers and realtors?
  - Environmentalists?
  - Downright "ornery" people?
  - OK, but, if you are a board member, watch your statements!

## **7. How do you raise a conflict issue?**

- When "uncertainty arises." How does uncertainty arise?
- "Upon request of that member or another member of board."
- "Vote."
- "Request made prior to the hearing."
- "May not be requested by others." (i.e. applicants or others cannot force a vote on disqualification.)
- "Except ....." (A board may adopt more stringent rules to govern conflicts.)
- A challenge must be made before the board votes.

## 6. Beware of Abuse of Office Statutes

**RSA 643:2 Misuse of Information.** A public servant ..... is guilty of a misdemeanor if, knowing that official action is contemplated or in reliance on information which he has acquired by virtue of his office or from another public servant, he:

I. Acquires or divests himself of a pecuniary interest in any property, transaction or enterprise which may be affected by such action or information; or

II. Speculates or wagers on the basis of such action or information; or

III. Knowingly aids another to do any of the foregoing.

The case of Evans v. Hall, 118 N.H. 920 (1978) establishes that criminal and civil liability can flow from this type of action by a land use board member. In Evans v. Hall, the plaintiffs (Evans) went to Ms. Hall in her capacity as both the planning board secretary and a member of the planning board and sought her assistance relative to a proposal for land they (Evans) intended to buy. Ms. Hall then approached the seller and purchased the land. In reviewing the denial of a Motion to Dismiss the Evans' lawsuit, the NH Supreme Court held that:

..... The purpose of this statute was to prevent government officials from using "inside" information for their own personal gains, and as such created a statutory conflict of interest provision enforceable either civilly or criminally.

.....

At common law we have previously held in the related area of conflict of interest that a conflict exists if an administrative official "votes on a matter in which he has a direct personal or pecuniary interest." These considerations especially apply in cases where public officials may gain personally from their inside information.

Evans v. Hall, 118 N.H. 920, 921 (1978) [citations omitted].

**RSA 643:1 Official Oppression.** A public servant ..... is guilty of a misdemeanor if, with a purpose to benefit himself or another or to harm another, he knowingly commits an unauthorized act which purports to be an act of his office; or knowingly refrains from performing a duty imposed on him by law or clearly inherent in the nature of his office.